

NO. 43582-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LAVESTER ALEXANDER JOHNSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable John A. McCarthy

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY¹

RESENTENCING IS REQUIRED FOR THE TRIAL COURT TO CORRECT ITS SENTENCING ERRORS.

The State argues that the trial court properly imposed condition 16 because “[u]nlike in Moultrie, there was evidence of several acts of molestation against two children – persons who might otherwise be considered physically and mentally vulnerable.” Brief of Respondent at 10-12. The State’s argument defies logic. In State v. Moultrie, 143 Wn. App. 387, 177 P.3d 776 (2008), a jury convicted Moultrie of raping 28-year-old S.S., who suffered from Downs Syndrome and could not perform many basic life skills. Id. at 390-91. The trial court imposed a condition prohibiting contact with “vulnerable” adults. On appeal, Moultrie argued that the term was unconstitutionally vague. Contrary to the State’s assertion, the Court did not “expressly” find that the term was not vague. The Court recognized that the term “vulnerable” prohibited Moultrie from having contact with “people like the victim” in this case. Id. at 782. However, the Court determined that it would not presume what the trial

¹ It should be noted that Respondent’s Statement of the Case fails to comply with RAP 10.3(a)(5), which requires a “fair statement of the facts.” The State’s “facts” contain detailed allegations made by CP and merely states that the defendant denied committing the acts, which does not constitute a “fair” statement of the case. Brief of Respondent at 2-3.

court intended and remanded for the trial court to clarify what it meant by “vulnerable.” Id. at 397-98.

Here, condition 16 states: “Do not initiate, or have in any way, physical contact with children under the age of 18 for any reason. Do not have any contact with physically or mentally vulnerable individuals.” CP 67. The condition prohibits contact with children and additionally prohibits contact with vulnerable individuals. Unlike S.S., there was no evidence that C.P. was physically or mentally impaired. Consequently, the term “vulnerable” is vague and a remand for clarification is required.

As conceded by the State, the trial court erred in prohibiting Johnson from having access to the internet or computers; prohibiting Johnson from joining or perusing any public social websites; and sentencing Johnson under RCW 9.94A.712. Brief of Respondent at 12-14. A remand is required for the trial court to correct its errors.

The Washington Supreme Court recently resolved whether sealing jury questionnaires violated article I section 10 or article 1, section 22 of the Washington Constitution. State v. Beskurt, 176 Wn.2d 441, 446-48, 293 P.3d 1159 (2013). The Court held that sealing questionnaires does not constitute a closure implicating the defendant’s public trial rights. Beskurt, 176 at 448.

B. CONCLUSION

For the reasons stated here and in appellant's opening brief, this Court should remand to the trial court for resentencing.

DATED this 17th day of May, 2013.

Respectfully submitted,

/s/ Valerie Marushige

VALERIE MARUSHIGE

WSBA No. 25851

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DECLARATION OF SERVICE

On this day, the undersigned sent by e-mail, the document to which this declaration is attached to Thomas Roberts, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 17th day of May, 2013 in Kent, Washington.

/s/ Valerie Marushige
VALERIE MARUSHIGE
Attorney at Law
WSBA No. 25851

MARUSHIGE LAW OFFICE

May 17, 2013 - 11:47 AM

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